

**U.S. Environmental Protection Agency
Office of Civil Rights**

INVESTIGATIVE REPORT

for

**Title VI Administrative Complaint File No. 5R-04-R5
(Midwest Medical Solutions Complaint)**

I. INTRODUCTION

A. Factual Background

By facsimile cover sheet dated May 23, 2004, [REDACTED] contacted the United States Commission on Civil Rights (USCCR) regarding the permitting of the Midwest Medical Solutions, LLC (Midwest Medical), facility by the Indiana Department of Environmental Management (IDEM). This complaint was subsequently referred by the USCCR to the United States Environmental Protection Agency (EPA or the Agency), Office of Civil Rights (OCR), by letter dated June 17, 2004. By letter dated May 24, 2007, OCR accepted for investigation the following claim:

Whether IDEM intentionally discriminated on the basis of race when it did not provide African Americans in Gary, Indiana, with a copy of the May 7, 2004, notice of decision to issue a permit to Midwest Medical Solutions.

This Investigative Report constitutes OCR's findings under Title VI and 40 C.F.R. Part 7 and dismissal of [REDACTED] complaint (EPA Complaint Number 05R-04-R5) pursuant to 40 C.F.R. § 7.120(g). OCR finds that the investigative record does not establish that IDEM intentionally discriminated on the basis of race in providing notice to the African American community in Gary, Indiana. OCR's inquiry initially focused on IDEM's distribution via mailings of the notice of decision regarding the granting of a permit to Midwest Medical on May 7, 2004 (Notice of Decision). Although the mailing of the notice of decision to certain individuals by IDEM did not strictly meet the standards contained in the Indiana Administrative Code, there is no basis in the record for a finding of intentional discrimination on the basis of race. Moreover, the public participation measures undertaken by IDEM should be considered as a whole, and these measures included not only the mailing of the Notice of Decision, but also publication of the Notice of Decision in two local newspapers and holding a public meeting and public hearing earlier in the permitting process.

B. Statutory Background

Title VI of the Civil Rights Act of 1964, as amended (Title VI) prohibits discrimination based on race, color, or national origin under any program or activity¹ receiving federal financial assistance.² Under Section 601 of Title VI,

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be

¹ The Civil Rights Restoration Act of 1987 broadly defines "program or activity" to include all of the operations of an entity, any part of which receives federal assistance. 42 U.S.C. § 2000d-4a.

² 42 U.S.C. §§ 2000d to 2000d-7.

subjected to discrimination under any program or activity receiving Federal financial assistance.³

This section prohibits intentional discrimination.⁴ In addition, Section 602 “authorize[s] and direct[s]” federal departments and agencies that extend federal financial assistance “to effectuate the provisions of section [601] . . . by issuing rules, regulations, or orders of general applicability.”⁵ At least forty federal agencies have adopted regulations that prohibit disparate impact discrimination pursuant to this authority.⁶ The Supreme Court has held that such regulations may validly prohibit practices having a disparate impact on protected groups, even if the actions or practices are not intentionally discriminatory.⁷ The EPA’s Title VI implementing regulations are codified at 40 C.F.R. Part 7. Under these regulations, a recipient of EPA financial assistance may not intentionally discriminate or use policies or practices that have a discriminatory effect based on race, color, or national origin.

As provided at 40 C.F.R. § 7.120, administrative complaints alleging discriminatory acts in violation of 40 C.F.R. Part 7 may be filed with the Agency. EPA reviews accepted complaints in accordance with 40 C.F.R. Part 7, Subpart E (§§ 7.105-7.135).

C. Regulatory Background - Intentional Discrimination

EPA’s Title VI implementing regulations prohibit intentional discrimination:

No person shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving EPA assistance on the basis of race, color, [or] national origin⁸

In addition, EPA regulations specifically provide, in part, that recipients shall not “[d]eny a person any service, aid or other benefit of the program,”⁹ “[p]rovide a person any service, aid or other benefit that is different, or is provided differently from that provided to others under the program,”¹⁰ or “[r]estrict a person in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, aid, or benefit provided by the program.”¹¹

Where direct proof of discriminatory motive is unavailable, it is necessary to evaluate

³ 42 U.S.C. § 2000d.

⁴ See *Alexander v. Choate*, 469 U.S. 287, 293 (1985); *Guardians Ass’n v. Civil Serv. Comm’n*, 463 U.S. 582, 607-08 (1983).

⁵ 42 U.S.C. § 2000d-1.

⁶ See *Guardians*, 463 U.S. at 619 (Marshall, J. dissenting).

⁷ See *Alexander*, 469 U.S. at 292-94; *Guardians*, 463 U.S. at 582; *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1406, *reh’g denied*, 7 F.3d 242 (11th Cir. 1993).

⁸ 40 C.F.R. § 7.30.

⁹ 40 C.F.R. § 7.35(a)(1).

¹⁰ 40 C.F.R. § 7.35(a)(2).

¹¹ 40 C.F.R. § 7.35(a)(3).

whether any circumstantial evidence of discriminatory intent exists. Such evidence may be found in various sources including statements by decision-makers, the historical background of the events at issue, the sequence of events leading to the decision at issue, a departure from standard procedures, the minutes of meetings, a past history of discriminatory conduct, and evidence of a substantial disparate impact on a protected group.¹²

If the *prima facie* case can be established, the burden shifts to the recipient to provide a justification or “establish[] that the same decision would have resulted even had the impermissible purpose not been considered.”¹³ If the recipient can make such a showing, the inquiry shifts back to EPA to show whether the justification proffered by the recipient is actually a pretext for discrimination.¹⁴

II. ALLEGATIONS

In his May 23, 2004, complaint to the USCCR, [REDACTED] enclosed copies of communications he had sent to various state agencies and also to the then governor of the state of Indiana. In these communications [REDACTED] indicated the following:

The IDEM did not send me personally the Notice of Decision concerning a permit for **Midwest Medical Solutions, (LLC) to construct and operate an INFECTIOUS Waste Processing Facility**. However I am responding to a letter sent to a friend that was post dated on the 10 day of March 2004. All citizens of Gary Indiana have a “Right to Know” and should have had full participation in the appeal process. We the citizens of Gary Indiana are appalled and disturbed about not having full participation in this appeal process. The letter of the recent IDEM decision was only sent to a very few people in the Miller area of Gary Indiana. (March 21, 2004 electronic mail from [REDACTED] to Candance Vogel and Annette Biesecker of the Office of Environmental Adjudication) (Emphasis in original)

In addition, the information on the “Notice of Decision” sent to only a few people in the Miller area of Gary contains confusing and misleading information on how to appeal to the State. The areas that would be directly affected by the negligent historic behavior of this company did not receive a “Notice of Decision [sic] from the IDEM. (Undated communication via facsimile from [REDACTED] to Governor Joseph Kernan) (Emphasis in original)

Federal agencies must make early, meaningful and relevant public participation in sitting [sic] and permitting decisions a reality for overburdened communities of color and poor

¹² See *Arlington Heights v. Metropolitan Hous. Redevelopment Corp.*, 429 U.S. 252 at 266-68 (1977) (evaluation of intentional discrimination claim under the Fourteenth Amendment).

¹³ *Id.* at 271, n.21; *Wesley v. Collins*, 791 F.2d 1255, 1262 (6th Cir. 1986).

¹⁴ *Id.* See generally, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

communities. ...Our communities do not have full participants [sic] in environmental decision-making, and there is still inadequate scientific and technical literature on the relationship between environmental pollutants and human health status, no history of previous violations of environmental codes as it relates to Midwest Medical Solution. (May 21, 2004 Petition for Administrative Review, filed by [REDACTED] with the Office of Environmental Adjudication) (Emphasis in original)

In a subsequent communication with OCR dated December 21, 2005, [REDACTED] stated:

I [REDACTED] who reside [sic] in a residence, just out side a mile of the private for-profit Infectious Waste Facility, am aggrieved and adversely affected by the permit issuance to Midwest Medical Solutions. As a residence [sic] living in the effected [sic] area and district, not receiving a notice of decision, believes this would have impeded my legal right, duty, and privilege to pursue financial, legal and public health interest with this matter. ... Every one whom I spoke with in our 4th district Claimed not to have received a Notice of Decision sent by IDEM even as they lived with in 100 yards of the proposed facility. The Notice contained information on how to contest the decision. We believe that IDEM's permitting and it [sic] evaluations prior to permitting this LLC (Limited Liability Company) was carried out in a discriminatory manner. (Emphasis in original)

III. POSITION STATEMENT FROM THE RECIPIENT

IDEM has been categorical in its denial of intentional discrimination during the public participation process regarding the permitting of the Midwest Medical facility. In a letter dated August 28, 2007, Deputy Attorney General Timothy J. Junk of the Indiana Attorney General's Office states on behalf of IDEM that, "IDEM contends there is no basis to support any allegation of discrimination, and most certainly no evidence of intentional discrimination." Mr. Junk's letter of August 28, 2007, and a subsequent letter dated October 16, 2009, describes the steps undertaken by IDEM to involve the public, which included:

1. Publication in April and May 2002, of public notice by IDEM in local newspapers of the permit application submitted by Midwest Medical for a facility in Gary, Indiana, and inviting comment thereon.
2. A public meeting, followed by a public hearing on July 11, 2002, regarding the proposed permit for Midwest Medical.
3. An August 9, 2002, meeting with officials from the City of Gary and community leaders regarding the permit.
4. Publication of a second public comment period in January 2004 in response to changes during the review of the permit.
5. A response to public comments document prepared by IDEM in 2004.
6. Notice to the Mayor of Gary, the President of the Gary Town Council, the Lake County Health Department, the Lake County Commissioners, and the Lake County Solid Waste Management District at the time of issuance of the permit in May 2004.

7. Publication in local newspapers of notice of the issuance of the permit, which provided information on administrative appeal rights.
8. Mailing of notice of the permit decision to approximately 1,400 individuals and business.

In addition to the argument set forth above, IDEM also claimed that OCR did not have jurisdiction over this complaint because the issuance of the permit to Midwest Medical did not involve federal funds. IDEM claimed that IDEM's solid waste program, which was the program that issued the permit to Midwest Medical, did not receive EPA funding. Finally, IDEM also argued that the proper venue to resolve [REDACTED] claims was through IDEM's administrative process, as provided by state law. IDEM stated that [REDACTED] had challenged the issuance of the permit through this process.

IV. METHODOLOGY OF THE INVESTIGATION

EPA conducted its investigation in accordance with the U.S. Department of Justice (DOJ) Investigation Procedures Manual (*See Investigation Procedures Manual for the Investigation and Resolution of Complaints Alleging Violations of Title VI and Other Nondiscrimination Statutes* (September 1998)). In addition to reviewing the information provided by [REDACTED] in his original complaint and the response thereto submitted on behalf of IDEM, OCR obtained additional information through the use of written requests for information addressed to both [REDACTED] and IDEM. These requests for information were supplemented by conversations between representatives for OCR, and [REDACTED] and IDEM. Finally, as further described below in the Findings of Fact, OCR reviewed the IDEM virtual case file for the permitting decision.

V. FINDINGS OF FACT

1. The EPA Grants Information and Control System database (*See* <http://www.epa.gov/enviro/html/gics/index.html>) indicates that in 2004 IDEM was a recipient of federal financial assistance from EPA.
2. Midwest Medical applied to IDEM for a solid waste facility permit on October 9, 2001 (Permit Application).¹⁵ The Permit Application was for a proposed facility at 1310 Michigan Street, Gary, Indiana 46402. (VFC Document 30033828, Permit Application) Prior to the submission of this permit application, Midwest Medical had already been operating a medical waste transfer station at this location; this activity did not require an IDEM permit. (Gary Post-Tribune, "Decision on waste a week away. IDEM still reviewing info on incineration." September 8, 2002)

¹⁵ The Permit Application, and other IDEM documents regarding the permitting process for Midwest Medical, can be accessed at IDEM's "Virtual Filing Cabinet" (<http://12.186.81.89/pages/public/search.aspx>). The Midwest Medical file can be accessed by searching within the Virtual File Cabinet (VFC) for the records for Stericycle Incorporated, 1310 Michigan St., Gary, Lake County, Indiana 46402. The Permit Application is document 30033828.

3. The Permit Application indicated that:

Midwest Medical Solutions, LLC (MMS) plans to construct and operate an infectious waste treatment and non-infectious medical waste transfer facility in Gary, Indiana. This facility will treat infectious waste through steam sterilization in two autoclave systems so that the waste can safely be disposed in permitted municipal solid waste landfills. MMS also plans to accept non-infectious medical waste and consolidate and transfer it off-site to permitted incinerators for destruction.

(VFC Document 30033828, Permit Application, Tab 3, Narrative Describing Proposed Operation, page 1)

4. The Midwest Medical Permit Application included a map showing the area within a ½ mile radius from the proposed facility (VFC Document 30033828, Permit Application, Tab 6). The Permit Application also included the names and addresses of owners or last taxpayers of record located within a ½ miles radius of the site boundaries; a total of 337 entities were listed. (VFC Document 30033828, Permit Application, Tab 15) Of the 337 entities listed in Tab 6 of the Permit Application seventeen entries were not on the mailing list utilized by IDEM (See Finding of Fact 38) for distribution of the Notice of Decision. Of these seventeen entries, the majority of entries are related to the City of Gary, the Lake County Board of Commissioners, or businesses such as banks or a railroad; four of these seventeen entries appear to be related to an address for an individual citizen.
5. By letter dated October 30, 2001, IDEM acknowledged receipt of the Permit Application to Midwest Medical and indicated that the Permit Application was undergoing review. Attached to this letter was a “Notice of Application to Local Officials,” which provided notice regarding the receipt of the Permit Application to local officials and which indicated that upon a determination by IDEM that the application was complete, a Notice of Receipt would be published in a local newspaper announcing the receipt of the Permit Application. The following entities were provided with a copy of the “Notice of Application to Local Officials”: the Lake County Health Department, the Lake County Commissioners, the Lake County Solid Waste Management District, the IDEM Northwest Regional Office, The Honorable Scott L. King (Mayor of Gary), The Honorable Roy Pratt (President of Gary Town Council), State Senators, and State Representatives. (VFC Document 30030244, Letter from Rick Phillips, Solid Waste Permits Section, Office of Land Quality, IDEM, to Russell A. Karlins, Midwest Medical, dated October 30, 2001).
6. By letter dated April 17, 2002, IDEM notified Midwest Medical that IDEM had finalized the completeness review of the Permit Application and the permit would then undergo technical review. The letter indicated that the completeness review only determined

whether the Permit Application had all of the required information within it and it did not imply, "that any technical items are adequate or inadequate, or that the application or facility is in any other way acceptable or unacceptable." (VFC Document 30030691, Letter from Jerome Rud, Chief, Solid Waste Permits Section, Office of Land Quality, IDEM, to Russell A. Karlins, Midwest Medical, dated April 17, 2002)

7. By letters dated April 17, 2002, IDEM sent to both the Times newspaper (Munster, IN) and the Post-Tribune newspaper (Gary, IN) a public notice regarding the Midwest Medical Permit Application for publication in those newspapers. The Lake County Health Department, the Lake County Commissioners, the IDEM Northwest Regional Office and the Lake County Solid Waste Management District were all copied on this letter. The public notice indicated that Midwest Medical had applied for a Construction/Operation Permit for a waste processing facility at 1310 Michigan Street, Gary, IN, and that IDEM had opened a comment period on this application. The notice indicated that the purpose of the comment period was to "solicit written technical comments from all interested parties." The notice also stated that the Permit Application was available for review at two IDEM offices (one of which was located in Gary, IN) and that staff was available to discuss the Permit Application with any interested party by telephone or in person. The notice also provided an IDEM contact person to whom comments should be addressed. (VFC Document 30030691, Letter from Jerome Rud, Chief, Solid Waste Permits Section, Office of Land Quality, IDEM, to the Times, Munster, IN, dated April 17, 2002, and Letter from Jerome Rud, Chief, Solid Waste Permits Section, Office of Land Quality, IDEM, to the Post-Tribune, Gary, IN, dated April 17, 2002)
8. The Times published the notice referenced above on April 26, 2002. (VFC Document 30030691, Publisher's Affidavit, dated April 29, 2002)
9. The Post-Tribune published the notice referenced above on May 9, 2002. (VFC Document 30030691, Publisher's Affidavit, dated May 14, 2002)
10. By letter dated May 6, 2002, the City of Gary provided preliminary comments to IDEM in opposition to the proposed Midwest Medical facility. This letter also included an article published in the Post-Tribune on January 19, 2002, quoting the Mayor of Gary as being in opposition to the proposed facility. (VFC Document 30040376, Letter from Dorreen Carey, Environmental Affairs Coordinator, City of Gary, to Jerome Rud, Chief, Solid Waste Permits Section, Office of Land Quality, IDEM, dated May 6, 2002)
11. By letter dated June 5, 2002, the City of Gary indicated to IDEM its continued opposition to the proposed Midwest Medical facility based on its concerns regarding the character and qualifications of those involved in the operation of Midwest Medical. (VFC Document 30041741, Letter from Dorreen Carey, Environmental Affairs Coordinator, City of Gary, to John Hale, Solid Waste Permits Section, Office of Land Quality, IDEM,

dated June 5, 2002)

12. By letter dated June 6, 2002, Councilwoman Carolyn D. Rogers of the Office of the Gary Common Council, transmitted to IDEM a resolution passed by the Gary Common Council opposing the permit application of Midwest Medical. (VFC Document 30041738, Letter from Councilwoman Carolyn D. Rogers, Office of the Gary Common Council, to John Hale, Solid Waste Permits Section, Office of Land Quality, IDEM, dated June 6, 2002)
13. On July 11, 2002, IDEM held a public meeting followed by a public hearing regarding the Permit Application. The public hearing and public meeting were held at the Lloyd McBride Hall, 1301 Texas Street, Gary, Indiana. This location was within one block of the proposed Midwest Medical facility. The public hearing portion of the evening went from approximately 8:05 PM until 9:50 PM. During the public hearing twenty-four individuals spoke and submitted verbal comments. (VFC Document 30035618, Hearing Transcript from July 11, 2002) Prior to the public meeting, the Post Tribune had published an article on July 9, 2002, which discussed the location, date, and time of the public hearing. (Steve Patterson, Gary Post-Tribune, "Medical waste processing OK sought" July 9, 2002)
14. The public hearing transcript (VFC Document 30035618, Hearing Transcript from July 11, 2002) had the following attachments:
 - A. A July 11, 2002, letter from Dorreen Carey, Environmental Affairs Coordinator, City of Gary, to Jerome Rud, Chief, Solid Waste Permits Section, Office of Land Quality, IDEM. This letter itself had a series of attachments, which included:
 - (i) A January 19, 2002, newspaper article stating Mayor Scott King's opposition to the Permit Application;
 - (ii) A May 6, 2002, letter from the City of Gary to IDEM outlining the City's opposition to the Permit Application;
 - (iii) A June 4, 2002 letter from the Zoning Administrator of the City of Gary, stating that no permits had been issued to Midwest Medical to operate a medical waste processing facility;
 - (iv) A June 5, 2002, letter from the City of Gary to IDEM opposing the Permit Application;
 - (v) A June 11, 2002, letter from the City of Gary Law Department to IDEM requesting an extension of the public comment period on the Permit Application;
 - (vi) A July 3, 2002, letter from the Mayor of Gary to the IDEM Commissioner in opposition to the Permit Application;
 - (vii) A July 9, 2002, newspaper article in which the Mayor of Gary indicates his opposition to the Permit Application. This article also states the time and place for the public meeting and public hearing that was to be held on July

11, 2002;

(viii) A July 10, 2002, letter from a lawyer representing the City of Gary and the Gary Sanitary District regarding the Permit Application;

(ix) A July 11, 2002, memorandum from the City of Gary Environmental Affairs Department indicating that Midwest Medical would be required to apply for a City of Gary air permit for the boiler associated with the autoclave units; and

(x) A list of Gary residents who called the Mayor's office to state their opposition to the Permit Application. A total of twenty-four individuals are on this list. Three of the individuals listed provided only a phone number, and not a mailing address. Of the twenty one individuals on this list who provided a mailing address, four were not on the IDEM mailing list used for distribution of the Notice of Decision.

B. A petition, submitted during the hearing by [REDACTED], of approximately 247 individuals who indicated they were opposed to the Midwest Medical facility. Of these 247 individuals, approximately fifty eight individuals were not on the mailing list utilized by IDEM (See Finding of Fact 38) for distribution of the Notice of Decision. An additional 30 names were submitted to IDEM on July 31, 2002. (VFC Document 30032714, Facsimile to John Hale, IDEM, from Black Oak Redevelopment, dated July 31, 2002) None of these thirty additional individuals were on the mailing list utilized by IDEM (See Finding of Fact 38) for distribution of the Notice of Decision.

C. The sign-up sheet used by IDEM during the public hearing. This list contained the names of 91 individuals; 86 of these 91 individuals were not on the mailing list utilized by IDEM (See Finding of Fact 38) for distribution of the Notice of Decision.

15. A Post-Tribune article on July 12, 2002, discussed the public hearing held on July 11, 2002, and provided information on how to comment on the Permit Application. (Lisa Deneal, Gary Post-Tribune, "Residents oppose waste plan" July 12, 2002)
16. On August 1, 2002, a Post-Tribune article indicated that the day of publication of that article was the last day for to public to submit comments to IDEM regarding the Permit Application. The article provided an email address and a facsimile number for submission of comments to IDEM. (Steve Patterson, Gary Post-Tribune, "It's last day for views on medical waste plan" August 1, 2002)
17. The City of Gary and Midwest Medical disagreed as to whether the property at 1310 Michigan Street was properly zoned for the activities proposed in the Permit Application. As a result, litigation ensued between these entities. (VFC Document 30031626, Letter from Richard S. VanRheenen to Bruce H. Palin, Deputy Assistant Commissioner, Office of Land Quality, IDEM, dated June 30, 2003, and the reply to this letter by Mr. Palin to Mr. VanRheenen, dated July 3, 2003)

18. As a result of the litigation between the City of Gary and Midwest Medical, the period for making a permit application decision on the Midwest Medical Permit Application was extended several times. (VFC Document 30031626, Letter from Richard S. VanRheenen to Bruce H. Palin, Deputy Assistant Commissioner, Office of Land Quality, IDEM, dated June 30, 2003, and the reply to this letter by Mr. Palin to Mr. VanRheenen, dated July 3, 2003)
19. By letter dated September 17, 2003, IDEM notified Midwest Medical that it had denied the Permit Application because as of that date the proposed facility did not have proper zoning approval and, accordingly, did not meet the requirements for a solid waste management facility permit. (VFC document 30031293, Letter from Bruce H. Palin, Deputy Assistant Commissioner, Office of Land Quality, IDEM, to Russell A. Karlins, Midwest Medical Solutions, dated September 17, 2003)
20. On October 3, 2003, Midwest Medical filed a Petition for Administrative Review before the Indiana Office of Environmental Adjudication. (VFC Document 30031213, Petition for Administrative Review submitted on behalf of Midwest Medical on October 3, 2003)
21. By letter dated December 19, 2003, the city of Gary notified IDEM that as a result of a settlement in the pending litigation, the zoning approval for Midwest Medical had been reinstated. (VFC Document 30029054, Letter from James D. Craig, Zoning Administrator, City of Gary, to Jerome L. Rud, Chief, Solid Waste Permits Section, Office of Land Quality, IDEM, dated December 19, 2003. See also, VFC Document 49963914, Settlement Agreement between the City of Gary and Midwest Medical, dated December 19, 2003)
22. IDEM and Midwest Medical entered into an Agreed Order for purposes of resolving the permit appeal pending with the Indiana Office of Environmental Adjudication. The Agreed Order provided that the Permit Application would continue to be reviewed by IDEM and that public notice of the Permit Application would be made for a public comment period primarily for the purpose of addressing any changes to the original Permit Application since the end of the first public comment period. (VFC Document 49965449, Agreed Order submitted by IDEM and Midwest Medical to the Indiana Office of Environmental Adjudication)
23. By letters dated January 26, 2004, IDEM sent to both the Times newspaper (Munster, IN) and the Post-Tribune newspaper (Gary, IN) a public notice regarding the Midwest Medical Permit Application for publication in those newspapers. The Lake County Health Department, the Lake County Commissioners, the IDEM Northwest Regional Office and the Lake County Solid Waste Management District were all copied on this letter. The public notice provided the permitting history and indicated that IDEM would recommence a review of the Permit Application. The notice indicated that there had been additional information submitted by Midwest Medical and that the intent of the public

notice was to solicit technical comment from all interested parties regarding changes and additions to the application since the last comment period. The notice also stated that the Permit Application was available for review at two IDEM offices (one of which was located in Gary, IN) and that staff was available to discuss the Permit Application with any interested party by telephone or in person. The notice indicated that written statements were to be submitted to John Hale, of IDEM, up to thirty days after being served with the notice or after publication in the newspaper. (VFC Document 30029032, Letter from John Hale, Solid Waste Permits Section, Office of Land Quality, IDEM, to the Times, Munster, IN, dated January 26, 2004, and Letter from John Hale, Solid Waste Permits Section, Office of Land Quality, IDEM, to the Post-Tribune, Gary, IN, dated January 26, 2004)

24. The Times published the notice referenced above on January 31, 2004. (VFC Document 30029032, Publisher's Affidavit, dated February 4, 2004)
25. The Post-Tribune published the notice referenced above on February 6, 2004. (VFC Document 30029032, Publisher's Affidavit, dated February 9, 2004)
26. The public comment period ran from January 30, 2004, until March 7, 2004. (VFC Document 30025794, IDEM Response to Comments)
27. Between January 31, 2004, and March 3, 2004, IDEM received seventeen comments in opposition to the Midwest Medical Permit Application. These comments were submitted by community residents, elected officials, and a member of an environmental organization. Of these seventeen commenters, eight were on the mailing list utilized by IDEM (See Finding of Fact 38) for distribution of the Notice of Decision. For a detailed listing of these comments, please refer to the Supplemental Findings of Fact, attached hereto as Appendix A.
28. On February 7, 2004, a Post-Tribune article indicated that IDEM had published legal notice of the thirty (30) day comment period for the proposed permit. The article provided information on how the public could comment. (Gary Post-Tribune, "Comments invited on waste plant. If state approves, it will process medical waste at Gary location." February 7, 2004)
29. By letter dated March 5, 2004, the City of Gary, Department of Environmental Affairs, reiterated its opposition to the Midwest Medical Permit Application. (VFC Document 30025927, Letter from Dorreen Carey, Environmental Affairs Coordinator, City of Gary, to John Hale, Office of Land Quality, IDEM, dated March 5, 2004)
30. By letter dated March 10, 2004, Carolyn D. Rogers, President, Gary Common Council, submitted a resolution passed by the Gary Common Council entitled, "A Resolution Opposing Importation of Infectious Waste and the Permit Application of Midwest

Medical Solutions, L.L.C.” (VFC Document 30025924, Letter from Carolyn D. Rogers, President, Gary Common Council, to John Hale, Office of Land Quality, IDEM, dated March 10, 2004)

31. A newspaper article published in the Gary Post-Tribune on March 11, 2004, cited an unnamed agency spokesman who indicated that IDEM had received, “1,400 identical letters signed by Gary residents opposing the plant.” The article goes on to state that the Gary Common Council President had attributed the letter writing campaign to the Baptist Ministers Conference of Gary and Vicinity. (Gary Post-Tribune, “Lake County wants say on site for waste plant. Proposed plant would be able to sterilize up to 66 tons of waste a day.” March 11, 2004) A subsequent article in the Gary Post-Tribune also references a letter writing campaign organized by church ministers in Gary which resulted in the submission of 1,400 letter opposing the Midwest Medical permit. (Gary Post-Tribune, “Medical waste plant gets OK. State approves permit forgery site after 2 ½-year process.” May 10, 2004)
32. On March 18, 2004, IDEM received ninety form letters all expressing their opposition to the Midwest Medical Permit Application. (VFC Document 30025832. See letters from ninety citizens to John Hale, Office of Land Quality, IDEM, received by IDEM on March 18, 2004.) Only five of the ninety individuals who submitted one of these letters were on the mailing list utilized by IDEM (See Finding of Fact 38) for distribution of the Notice of Decision.
33. On May 7, 2004, IDEM issued solid waste facility permit FP 45-41 to Midwest Medical for operation of the infectious waste processing facility at 1310 Michigan Street, Gary, Indiana. (VFC Document 30025794, Letter from Thomas Linson, Chief, Permit Branch, Office of Land Quality, IDEM, to Russell A. Karlins, Midwest Medical, dated May 7, 2004, which enclosed the permit)
34. By letters dated May 7, 2004, IDEM sent to both the Times newspaper (Munster, IN) and the Post-Tribune newspaper (Gary, IN) a public notice regarding IDEM’s Notice of Decision to issue a solid waste processing facility construction/operation permit for the Midwest Medical infectious waste processing facility for publication in those newspapers. The Lake County Health Department, the Mayor Gary, the President of the Gary Town Council, three members of the Lake County Commissioners, the IDEM Northwest Regional Office, and the Lake County Solid Waste Management District were all copied on this letter. The Notice of Decision indicated that IDEM had issued a solid waste processing facility construction/operation permit to Midwest Medical and that a copy of the permit was available for review at the IDEM office in Gary or at the IDEM website. The Notice of Decision described the procedure to be followed to challenge the issuance of the permit before the Office of Environmental Adjudication. The Notice of Decision also requested that the reader, “Please bring this matter to the attention of persons you believe may have an interest in it.” The Notice of Decision is attached to this

Investigative Report as Appendix B. (VFC Document 30025794, Letter from John Hale, Solid Waste Permits Section, Office of Land Quality, IDEM, to the Times, Munster, IN, dated May 7, 2004, and Letter from John Hale, Solid Waste Permits Section, Office of Land Quality, IDEM, to the Post-Tribune, Gary, IN, dated May 7, 2004, and attachments thereto)

35. At the same time IDEM issued the permit, it published a Response to Public Comments document, which totaled five pages and addressed thirty-one comments. The Response to Public Comments is attached to this Investigative Report as Appendix C. (VFC Document 30025794, IDEM Response to Public Comments, Midwest Medical Solutions, Infectious Waste Processing Facility Application)
36. The Times published the Notice of Decision on May 18, 2004. (VFC Document 30025794, Publisher's Affidavit, dated May 20, 2004)
37. The Post-Tribune published the Notice of Decision on May 19, 2004. (VFC Document 30025794, Publisher's Affidavit, dated May 19, 2004)
38. IDEM mailed approximately over 1,400 copies of the Notice of Decision on or about May 10, 2004. (VFC Document 30025776, Petition for Administrative Review submitted by [REDACTED], dated May 21, 2004. See also, VFC Document 30025738, Petition for Review and Stay submitted by the Gary Common Council to IDEM on May 26, 2004) Under cover letter dated October 16, 2009, Deputy Attorney General Timothy J. Junk provided OCR with the mailing list utilized by IDEM to distribute the Notice of Decision. (See October 16, 2009 letter from Timothy J. Junk, Indiana Office of the Attorney General, to Yasmin Yorker, OCR, EPA) This list was subsequently provided to OCR in an electronic format on June 7, 2010. (See electronic mail from Beth Admire, IDEM, dated June 7, 2010).
39. By letter dated May 17, 2004, [REDACTED] wrote to IDEM expressing her concern regarding the Midwest Medical facility and enclosed an article that had appeared in the Post-Tribune regarding the issuance of the permit. (VFC Document 30025786, Letter from [REDACTED] to John Hale, Permits Branch, Office of Land Quality, IDEM, dated May 17, 2004)
40. By letter dated May 19, 2004, [REDACTED] wrote to IDEM expressing her dissatisfaction with the issuance of the permit. The letter indicated that it was in response to the documents sent to the writer by IDEM. (VFC Document 30025782, Letter from [REDACTED] to John Hale, IDEM, dated May 19, 2004)
41. On May 21, 2004, [REDACTED] submitted a Petition for Administrative Review to the Office of Environmental Adjudication. The Petition for Administrative Review states as follows:

We the citizens of Gary Indiana are appalled and disturbed about not having full participation in this appeal process. This letter of the recent IDEM decision was only sent to very few citizens in the area of Gary Indiana and contains misleading information on the deadline to appeal and the staff location for the Permits Branch, Office of Land Quality for us to contact. The IDEM "Notice of Decision" was not sent to the immediate affected areas of this decision to issue a permit to **Midwest Medical Solutions, (LLC) to construct and operate an INFECTIOUS Waste Processing Facility.** (Emphasis in original)

(VFC Document 30025780, Petition for Administrative Review submitted by Irene E. Tate to IDEM, dated May 21, 2004)

42. In an email to IDEM dated May 22, 2004, [REDACTED], the Complainant in this matter, also filed a Petition for Administrative Review, which indicated the following:

It is the 21 day of March in 2004, and sending you my petition for administrative review via Email and U.S. Postal Service. The IDEM did not send me personally the Notice of Decision concerning a permit for **Midwest Medical Solutions, (LLC) to construct and operate and INFECTIOUS Waste Processing Facility.** However, I am responding to a letter sent to a friend that was post dated on the 10 day of March 2004. All citizens of Gary Indiana have a "Right to Know" and should have had full participation in the appeal process. We the citizens of Gary Indiana are appalled and disturbed about not having full participation in this appeal process. This letter of the recent IDEM decision was only sent to very few people in the Miller area of Gary Indiana. (Emphasis in original)

The Petition for Administrative Review submitted by [REDACTED] is similar, but not identical, to the one submitted by Ms. Tate. (VFC Document 30025776, Petition for Administrative Review submitted by [REDACTED], dated May 21, 2004)

43. On May 25, 2004, the Lake County Solid Waste Management District submitted to IDEM a "Petition for Adjudicatory Hearing, Administrative Review and Stay." (VFC Document 30025755, Petition for Adjudicatory Hearing, Administrative Review and Stay, dated May 25, 2004)
44. On May 26, 2004, the Gary Common Council submitted a Petition for Review and Stay to IDEM. (VFC Document 30025738, Petition for Review and Stay submitted by the Gary Common Council to IDEM on May 26, 2004)
45. Although the record is unclear as to the date of the document, it appears that on or about May 26, 2004, IDEM received sheets with signatures and addresses for neighboring citizens to the Midwest Medical facility; the top portion of each sheet contained the

following identical header:

We, the undersigned hereby certify by our signatures that we are in direct opposition to the Midwest Medical Solutions infectious waste processing facility located at 1310 Michigan St. Gary, Lake County, Indiana. This petition is a request that a "stay" be executed as prescribed in correspondence postmarked May 10, 2004. As neighbors living in G1-10¹⁶ (8th Avenue - 5th Avenue and East side of Ohio St - Alabama) directly in proximity to Midwest Medical Solutions facility, we appreciate your expression of support.

These sheets contained 136 signatures. (VFC Document 30025738, Petition for Stay submitted by neighbors living in G1-10)

46. By letter dated May 27, 2004, a Petition for Administrative Review was submitted on behalf of the Baptist Ministers Conference of Gary and Vicinity, the Church of God in Christ Northwest Indiana Clergy Council, and the Interfaith Federation. (VFC Document 30025738, Letter from Juan A. Rodriguez, President, Interfaith Federation, Reverend Chet Johnson, President, Baptist Ministers Conference of Gary and Vicinity, and Elder Willie Smith, President, Church of God in Christ Northwest Indiana Clergy Council, to the IDEM Office of Environmental Adjudication, dated May 27, 2004)
47. On May 27, 2004, [REDACTED] submitted a Petition for Administrative Review to IDEM's Office of Environmental Adjudication. This Petition states in pertinent part as follows:

Specifically, we live in the immediate area and will be directly involved along with the accompanying signatory of others who live within in 1 mile of this facility. ... Also, note that this 'NOTICE OF DECISION' that we received should not have been our initial notification of this facility. Since we are so close and adversely affected we should have been notified much earlier in this process.

(VFC Document 30025736, Petition for Administrative Review submitted by [REDACTED], dated May 27, 2004)

48. By letter dated June 21, 2004, IDEM wrote to [REDACTED]. This letter, in part, addressed [REDACTED] allegation that the public did not have an opportunity to participate in the permitting process. The letter states, in pertinent part:

Let me first respond to your allegation that the permit was issued in secret. The permit process was actually conducted in a highly public manner. On October 30, 2001, the notice of receipt of the application, as required under IC 13-15-3-1

¹⁶ The designations G1-10 appear to refer to Lake County political precincts.

(<http://www.in.gov/legislative/ic/code/title13/ar15/ch3.html#IC13-15-3-1>), was sent to the Lake County Health Department, the Lake County Commissioners, the Lake County Solid Waste District, Mayor Scott Kin, Council President Roy Pratt and area state legislators. On April 26, 2002, the first comment period notice was printed in the Munster Times. On May 9, 2002, the first comment period notice was also printed in the Gary Post-Tribune, as required under IC 13-15-5 (<http://www.in.gov/legislative/ic/code/title13/ar15/ch5.html>). That comment period ended on June 9, 2002.

Furthermore, on July 2, 2002, a second public comment period notice was printed in the Gary Post-Tribune. This was done in conjunction with a requested public hearing. On July 11, 2002, a public meeting and hearing was conducted at the Lloyd McBride Hall, 1301 Texas Street, in Gary.

Because an issue regarding local zoning was unresolved, the permit was denied on September 17, 2003. However, the zoning question was resolved between the City of Gary and Midwest Medical Solutions, and the Gary Zoning Administrator sent IDEM verification on December 19, 2003, that Midwest Medical Solutions was properly zoned. On January 30 and February 4, 2004, a third comment period was published in the Gary Post-Tribune and the Munster Times to address changes since the permit was denied. On May 7, 2004, the permit was issued to Midwest Medical Solutions and the notice of the decision was sent to nearly 1400 affected parties, including land owners and residents within ½ mile of the proposed site. Individuals who had commented on the application during this period and had provided their addresses were also notified. Lastly, on May 17 and 18, the notice of decision was published in the Gary Post-Tribune and the Munster Times, respectively.

The notices of decisions were mailed with a supplemental handout explaining the appeal process. The handout clearly states the appeal timeframes. At this time, several appeals have been received by IDEM.

(VFC Document 30021530, Letter from Lori F. Kaplan, Commissioner, IDEM, to [REDACTED], dated June 21, 2004)

49. On July 1, 2004, the Post-Tribune published an article describing a meeting that had taken place on the prior day at the Trinity Missionary Baptist Church, which had been organized by the Interfaith Federation, Church of God in Christ, Northwest Indiana Clergy Council, and Baptist Ministries Conference of Gary. The article indicated that several hundred people had attended and that State Representatives Charlie Brown and Vernon Smith, Lake County Solid Waste Management District director Jeff Langbehn, and Gary Mayor Scott King had all spoken at the meeting. (Kass Stone, Gary Post-Tribune, "Hundreds protest medical waste site. Residents rail against Midwest Medical

Solutions plant to be built in Gary.” July 1, 2004)

50. On August 25, 2004, Judge Catherine Gibbs, Environmental Law Judge, Indiana Office of Environmental Adjudication, issued Findings of Fact, Conclusions of Law, Final Order of Dismissal. This document states, in pertinent part:

Findings of Fact

* * *

2. [REDACTED] filed a Petition for Review of the Permit on May 22, 2004. ...

* * *

5. [REDACTED] objects to the Permit on the following grounds:
- a. IDEM failed to consider Executive Order 12,898 and Title VI in issuing this Permit.
 - b. IDEM usurped the authority of the Lake County Solid Waste District in issuing the Permit.
 - c. IDEM failed to properly notify him and others of the decision.
 - d. IDEM failed to properly consider health concerns of the community.
 - e. IDEM failed to properly consider bio-terrorism concerns and other issues of national security.

6. On July 7, 2004, Midwest filed a Motion to Dismiss against [REDACTED]...

* * *

Conclusions of Law

18. [REDACTED] alleges that he is aggrieved and adversely affected by the issuance of the Permit for a number of reasons. He alleges that he lives within one mile of the facility and that IDEM failed to follow the appropriate procedure in issuing this Permit.

19. [REDACTED] alleges that IDEM failed to consider Executive Order 12,898 and Title VI of the United States Code and failed to consider national security issues in issuing the Permit. However, he fails to state what specific statute or rule requires IDEM to consider these provisions in issuing this Permit. To the extent that he is raising constitutional issues, it is clear that the trial courts in Lake County have primary jurisdiction over constitutional issues. *Town Board of Orland v. Greenfield Mills, Inc.*, 663 N.E.2d 523 (Ind. 1996). This Court does not have the authority to consider these arguments. Id.

* * *

22. He also raises the issue of whether proper notice was sent to him. IC 4-21.5-3-5, in pertinent part states:

(b) When an agency issues an order described in subsection (a), the agency shall give a written notice of the order to the following persons:

(5) Each person who has a substantial and direct proprietary interest in the subject of the order.

(f) ...The agency shall make a good faith effort to identify and notify these persons, and the agency has the burden of persuasion that it has done so. The agency may request that the applicant for the order assist in the identification of these persons. Failure to notify any of these persons is not grounds for invalidating an order, unless an unidentified person is substantially prejudiced by the lack of notice.

██████████ has failed to show how he was prejudiced by the lack of notice. In fact, it is apparent that he was not prejudiced, even if he is correct in his arguments concerning lack of notice, as he filed a Petition for Review on time.

23. ██████████ has failed to state facts that he is aggrieved or adversely affected that are sufficient to survive the Motion to Dismiss and, therefore, is dismissed from this proceeding.

ORDER

AND THE COURT, being duly advised, hereby **ORDERS, JUDGES AND DECREES** that the Petitioner's Motion to Dismiss is **GRANTED** as to

██████████ ...

(VFC Document 30019003, Findings of Fact, Conclusion of Law, Final Order of Dismissal, issued by the IDEM Office of Environmental Adjudication, on August 25, 2004)

51. By order dated October 26, 2004, the Office of Environmental Adjudication granted summary judgment in favor of IDEM and Midwest Medical and against the Lake County Solid Waste Management District and the City of Gary Common Council. The Office of Environmental Adjudication also granted summary judgment in favor of Midwest Medical and against ██████████. This order resolved all outstanding permit appeals. (VFC Document 30018227, Findings of Fact, Conclusion of Law and

Final Order, issued by the IDEM Office of Environmental Adjudication, on October 26, 2004)

52. There was subsequent litigation between the Lake County Solid Waste Management District and Midwest Medical regarding the need for such a facility in Lake County, but ultimately Midwest Medical prevailed in this litigation.

VI. ANALYSIS AND RECOMMENDED DETERMINATIONS

A. Jurisdiction

OCR will first address the jurisdictional argument put forth in correspondence submitted by the Indiana Attorney General's Office that OCR did not have jurisdiction over this complaint because the issuance of the permit to Midwest Medical did not involve a program that received federal financial assistance from EPA. The Indiana Attorney General's Office claimed that IDEM's solid waste program, which was the program that issued the permit to Midwest Medical, did not receive EPA funding. The argument being made on behalf of IDEM was that since Title VI only applies to programs or activities that receive federal financial assistance and since there was no program or activity receiving federal financial activity in this instance, OCR did not have jurisdiction over this complaint.

Following the passage of the Civil Rights Restoration Act 1987 (CCRA), Pub. L. No. 100-259, 102 Stat. 28 (1988), the language of the Civil Rights Act is explicitly clear that the term "program or activity" is to be interpreted broadly. As to State and local governments, Title VI states:

For the purposes of this subchapter, the term "program or activity" and the term "program" mean all of the operations of—

- (A) a department, agency, special purpose district, or other instrumentality of a State or a local government; or
- (B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

any part of which is extended Federal financial assistance. 42 U.S.C. § 2000d-4a(1).

Accordingly, since IDEM received federal financial assistance at the time of the alleged discriminatory act, the agency as a whole was subject to Title VI.

B. Public Participation

OCR investigated whether IDEM intentionally discriminated on the basis of race when it did not provide African Americans in Gary, Indiana, with a copy of the May 7, 2004, Notice of Decision to issue a permit to Midwest Medical. This allegation focuses on the final stage of the permitting process, that is, the actual issuance of the permit by IDEM to Midwest Medical, which concluded a process that began with the submission of the permit application in October 2001.

The Supreme Court's decision in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*¹⁷ discussed the means of evaluating whether official conduct was motivated by a discriminatory purpose: "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."¹⁸ The Supreme Court identified several factors for potential consideration: (1) the impact of the official action – whether it "bears more heavily on one race than another;" (2) the historical background of the decision; (3) the sequence of events leading up to the challenged decision, including departures from normal procedures and usual substantive norms; and (4) the legislative or administrative history of the decision, particularly where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports.¹⁹

1. Impact of the Official Action

There is no evidence that the official action, in this instance the distribution by IDEM of the Notice of Decision, impacted the African American community more heavily than any other race. OCR plotted the location of the majority of those on the IDEM mailing list on a map; this map also contained demographic data for the area obtained from the 2000 Census. This map is attached hereto as Appendix D. A review of this map reveals that the distribution of the notices was primarily in neighborhoods in the vicinity of the Midwest Medical facility, which are neighborhoods with a high percentage of African-American residents. Moreover, it is important to note that the May 7, 2004 Notice of Decision was published in both the Gary Post-Tribune and the Times. (See Findings of 34, 36 – 37) The Notice of Decision published in these newspapers included information on how to appeal the decision and urged readers to convey the information to those who may not have seen the notice. (See Finding of Fact 34) There is no suggestion in the record that the two newspapers selected for publication of the notices were not newspapers of general circulation for that area. Accordingly, OCR can not conclude that the impact of the distribution of the Notice of Decision, "bears more heavily on one race than another."

¹⁷ 429 U.S. 252 (1979)

¹⁸ *Id.* at 266.

¹⁹ *Id.* at 266-268.

2. Historical Background of the Decision

OCR's evaluation of this factor focused on other IDEM activities concerning public participation to determine if there was any evidence of discriminatory intent. OCR's review of the record in this regard leads it to the conclusion that IDEM undertook various measures to notify and involve the public during the permitting process.

Throughout the permitting process IDEM published notices of its proposed permitting decisions in two local newspapers, the Gary Post-Tribune and the Times. (See Findings of Fact 7 - 9, 23 - 25, 34, 36 - 37) At the same time that these notices were published, local officials, which included elected representatives and heads of regulatory agencies, were also notified. (See Findings of Fact 5, 7, 23, 34)

IDEM also held a public meeting and public hearing on July 11, 2002, which was held at a location within one block of the proposed facility. The meeting was held in the evening and provided the opportunity to the public to both ask questions (during the public meeting) and to make comments for the record (during the public hearing). (See Finding of Fact 13 - 14) Moreover, the permitting of the Midwest Medical facility received extensive newspaper coverage, which frequently included information on how to participate in the process. (See Findings of Fact 13, 28, 31) Finally, IDEM prepared a response to comments document, which addressed the concerns expressed by the community throughout the permitting process. (See Finding of Fact 35 and Appendix C) Viewing these efforts as a whole, OCR concludes that IDEM did engage in a process where it provided notice to the community of its proposed actions and ultimately provided information on how to challenge the decision following the issuance of the permit.

3. Sequence of Events Leading up to the Challenged Decision

OCR initially tried to determine if the distribution of the Notice of Decision departed from the normal procedures. OCR began its analysis of IDEM's distribution of the May 7, 2004, Notice of Decision by examining the requirements found in the IDEM regulations. Indiana Code (IC) 13-15-5-3, which concerns the issuance or denial of a permit, provides in relevant part, as follows:

- (c) Notice of the commissioner's action shall be served upon the following:
 - (1) The permit applicant.
 - (2) Each person who submitted written comments under section 1 of this chapter.
 - (3) Each person who requests notice of the permit determination.
 - (4) The Administrator of the United States Environmental Protection Agency if service is required under the applicable federal law.

An October 16, 2009 letter submitted by the Indiana Attorney General's Office on behalf of IDEM, indicated that IDEM published notice in major newspapers in the vicinity of a proposed facility (in this case the Gary Post-Tribune and the Times) and sent notices with respect to permitting decisions to: (1) all residents impacted within the ½ mile radius, (2) anyone who attended the public hearing and provided their name and address, (3) anyone who provided written comment with a return address, and (4) anyone who specifically asked for notice.

A review of the record indicates that IDEM did not strictly comply with either the regulations set forth in the Indiana Code or the practice that it indicated it followed with respect to providing public notice. The majority, but not all, of the entities identified as living within ½ mile radius of the Midwest Medical facility were included in the mailing list utilized by IDEM to distribute the Notice of Decision. (See Findings of Fact 4 and 38) Moreover, there are numerous instances of individuals who participated in the public hearing or submitted written comments to IDEM, yet were not on the mailing list of those provided notice of the issuance of the permit. (See Findings of Fact 14.A.(x), 14.B., 14.C., 27, and 32. In addition, please refer to Appendix A, the Supplemental Findings of Fact.) Particularly troubling is the fact that despite an apparent letter writing campaign, which may have resulted in the submission of as many as 1,400 letters in opposition to the Midwest Medical permit (See Finding of Fact 31), it is impossible to determine if the individuals who submitted these letters were included in the mailing list providing notice of the permit issuance. There is no document within the Virtual File Cabinet which captures 1,400 identical letters and attempts to locate these documents as part of the investigation proved unsuccessful (See electronic mail from Elizabeth Admire, IDEM, to Daniel L. Isales, U.S. Environmental Protection Agency, dated September 8, 2010). Nevertheless, the record does indicate that IDEM mailed over 1,400 notices. (See Finding of Fact 38)

However, although several citizens, including the Complainant herein, claimed that the notices were not widely distributed (See Findings of Fact 41 and 42), there is no basis in the record to conclude that those who were listed in IDEM's mailing list did not, in fact, receive such notices. Attempts to clarify this point with Complainant were unsuccessful as Complainant did not respond to a Request for Information sent to him by OCR in September 2010. Nevertheless, we note that the Complainant had actual notice of the permitting action as evidenced by his involvement in the permit appeal process.

Accordingly, there is no basis in the record to conclude that IDEM's distribution of the Notice of Decision was influenced in any way by demographic considerations; the fact that the record reveals failures by IDEM to comply with its regulations and its stated policy with respect to distribution of notices, does not automatically lead to the conclusion that IDEM intentionally discriminated against African Americans in Gary, Indiana.

4. Legislative or Administrative History of the Decision

There is no evidence in the record to suggest that the distribution of the Notice of Decision was influenced in any way by discriminatory intent. There are no contemporary

statements, minutes of meetings, or records to suggest such a finding. To the contrary, as already explained previously, the evidence as a whole leads to conclusion that race was not a factor in IDEM's public participation activities.

5. Conclusion

This investigation did not evaluate the merits of the issuance of the permit to Midwest Medical, it only evaluated whether there was evidence of intentional discrimination on the basis of race in the issuance of the May 7, 2004, Notice of Decision. It is clear, however, that there was widespread opposition to the Midwest Medical facility, not only by community members in the vicinity of the facility, but by numerous elected officials. (See Findings of Fact 10 – 14, 27, 29 – 32. See also the Supplemental Findings of Fact) Throughout the process, however, IDEM undertook measures to inform the public and provided the public with an opportunity to comment. The distribution of the Notice of Decision does not show any pattern of racial discrimination. Although a large number of community members who submitted comments or who had participated in the permitting process were not included in the mailing list for the May 7, 2004, Notice of Decision, IDEM did mail over 1,400 notices. Moreover, the actions taken by IDEM prior to May 7, 2004, do not show any pattern of discrimination in notifying the public. To the contrary, it shows that substantial efforts were employed in notifying the public of upcoming activities. Mailing the May 7, 2004, Notice of Decision was not the sole means of communicating with the public, as IDEM also relied upon newspaper publication. When the record is viewed as a whole, there is not sufficient evidence to find that IDEM intentionally discriminated on the basis of race.